IN THE

Supreme Court of the United States

OCTOBER TERM 1941

NO. ~~958 - 959~~ 26-27

HENRY ANTON PFISTER,

Petitioner,

v.

NORTHERN ILLINOIS FINANCE CORPORATION, ALGONQUIN STATE BANK, HARTMAN AND SON, E. C. HOOK, and EMIL GEEST,

Respondents.

SUPPLEMENTAL BRIEF TO ACCOMPANY BRIEF.

On Application for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit

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INDEX OF CASES.

The index of cases which was to have been printed here was inadvertently printed in the petition and brief beginning at page iv. Therefore the cases discussed in this supplemental brief will be found indexed at pages iv to vi of the petition and brief.

As all of the cases included in this supplemental brief are placed in alphabetical order they may be readily found without an index.

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As indicated in the Brief, a large number of questions are presented. The decided cases involved are numerous and the majority of them pertain to several of the questions presented. To avoid repetition of quotations and discussions in the course of the argument, all the cases referred to are here digested in alphabetical order in one group. Each citation is given a number and reference to each citation in the brief is indicated by its number and the page of this Supplemental Brief on which it is digested.

NOTE: Cross references between cases in this Supplemental Brief are indicated by the phrase "No. — page — of this brief".

ALPHABETICAL LIST OF CASES CITED IN THE BRIEF.

No. 1. *In re Albert, Brooklyn* v. *Albert*, CCA 2 (1941) 122 Fed. (2d) 393.

From the opinion:

"The jurisdiction of the bankruptcy court when invoked by the filing of the petition continues until the estate is closed. Its power to review orders of referees flows from section 2(10) of the Act and nothing in section 39 (c) expressly limits that power."

. . . .

"Before section 39(c) took effect, General Order 27, now abrogated, and local rules applied. Under General Order 27 a petition to review, if filed within a reasonable time after the entry of the order, was to be heard as a matter of right."

. . . .

"And as section 39(c) of the Act neither in terms or by necessary implication curtails the jurisdiction of the court, it follows that the court has the unimpaired power to exercise that jurisdiction as formerly in respect to petitions to review orders of referees."

No. 2. *In re Amsterdam*, District Court New York (1940), 35 Fed. Supp. 618.

From the opinion:

"Undoubtedly, it is true that, although Section 39(c) provides that a petition for review may be filed by the party aggrieved within ten days after the entry thereof or within such extended time as the court may for cause shown allow, the court may nevertheless extend the time after the ten day period has elapsed."

No. 3. *Andrews* v. *Virginian*, (1919), 248 U. S. 272. A judgment was rendered in a county court of the State of Virginia on June 16, 1916. A writ of error was denied by the state court of appeals "declining to take jurisdiction" on November 13, 1916. Review of the judgment of the County Court was then sought in this court. The question for decision was when did the judgment of the County Court become final? It was held that the judgment of the County Court was a final judgment on November 13, 1916, when the state Court of Appeals declined to take jurisdiction for review.

At page 275 this court said:

> "Undoubtedly, before the action of the Court of Appeals the judgment was not final, and was susceptible of being reviewed and reversed by that court." . . .
> "It is true that under the law of Virginia in a case like this the power of the Court of Appeals to review the judgment of the trial court was gracious or discretionary, and not imperative or obligatory; but the existence of the power, and not the considerations moving to its exercise, is the criterion by which to determine whether the judgment of the trial court was final at the time of its apparent date, or became so only from the date of the happening of the condition—the action of the Court of Appeals—which gave to that judgment its only possible character of finality for the purpose of review in this court."

No. 4. *Aspen* v. *Billings* (1893), 150 U. S. 31. Time for appeal six months. Petition for rehearing filed within time in five days. It was argued that the appeal to this court came too late.

Beginning at page 36 the court said:

> "The decree dismissing complainants' bill was entered on October 20, 1890, but an application for a rehearing was made shortly thereafter and during the same term, but not disposed of until May 5, 1891.

The rule is that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment of decree does not take final effect for the purposes of the writ of error or appeal. *Brockett* v. *Brockett* [No. 10 page 9 of this brief]; *Texas and P. R. Co.* v. *Murphy* [No. 52 page 39 of this brief]; *Memphis* v. *Brown* [No. 32 page 26 of this brief].

If this case falls within that category, then the six months within which the appeal had to be taken under Section 11 of the Judicial Act of March 3, 1891, did not commence to run until May 5, 1891, and the appeal was in time.

It is true Equity Rule 88 provides that 'no rehearing shall be granted after the term at which the final decision of the court shall have been entered and recorded, if an appeal lies to the Supreme Court'; but if this petition for rehearing was filed in season, and entertained by the court, then the decree, although entered in form, did not discharge the parties from the attendance in the cause, and they were bound to follow the petition thus pending to the next term. The suit was thereby prolonged until the application was disposed of in the regular course of proceeding. This is expressly so ruled in *Phillips* v. *Ordway* ('*Goddard* v. *Ordway*') [No. 21 page 18 of this brief].

"The decree does not in legal effect remain final while the petition is pending and the prescript of Rule 88 must be construed to mean that a rehearing can not be granted after the lapse of the term unless application is made therefor during the term and being entertained. The decree is thereby prevented from passing beyond the control of the court."

"But it is said this cannot be the result under either statute or rule of the mere filing of a motion or peti

tion for rehearing and that it does not affirmatively appear in this case that the motion or petition was entertained by the court. But we should be inclined to hold, if a decision in that regard were called for, that, since the application was passed upon as having been duly made, the presumption must be indulged that it was entertained by the court in the first instance and during the term at which the decree was pronounced."

No. 5. *Benitez* v. *Bank*, (1941) 313 U. S. 270. In a farmer debtor proceeding a creditor moved to dismiss the petition on the ground that the petitioner was not a "farmer" claiming that the definition of a "farmer" in Section 1 (17) of the Bankruptcy Act as amended by the Chandler Act of 1938 superceded the previously enacted definition of a "farmer" in Section 75 (s) of the Bankruptcy Act. Section 75(r) reads: "For the purpose of this section and section 4(b) the term 'farmer' includes", etc., etc.

This court said:

"The argument ignores the plain import of Section 75(r). The meaning of the phrase 'for the purposes of this section' is hardly open to question."

"Designed for a particular purpose, the relief of hard-pressed farmers, it was regarded as a special temporary enactment."

"Naturally enough, legislation drafted for such a purpose carried its own test for determining the persons to whom it should apply."

"We conclude that petitioner's activities must be tested by the definition in Section 75(r) rather than by the one in Section 1 (17)"

No. 6. *Boesch* v. *Graff* (1890), 133 U. S. 697. On appeal in a patent case this court said, at the beginning of the

opinion, that the error complained of "which goes upon the refusal of the Circuit Court to grant a rehearing not being open to consideration here."

No. 7. *Bonner* v. *Potterf*, CCA 10 (1931), 47 Fed. (2d) 852. Referee in bankruptcy denied claim. On petition for review the referee was sustained by the district court. After time for appeal had expired a motion was presented to the district court to re-refer the claim for a decree on final hearing. The district court overruled the motion for re-reference and indicated that the original order would be reentered to give opportunity to appeal.

The court said:

> "It is therefore apparent that the act of the court was simply a re-entry of the original order for the sole purpose of saving the rights of the appellant in regard to appeal which, under such circumstances, is a matter beyond the sound discretion of the trial court."

No. 8. *Borchard* v. *California*, (1940), 310 U. S. 311.

At page 317 this court said:

> "That orderly procedure includes an application by the debtor, such as was made in the present case, for an appraisal of the property, an order that the debtor remain in possession upon terms fair and equitable to him and to secured creditors, and the entry of a stay which will assure him of his **possession for three years from the date of the order**, upon the conditions mentioned in the Act. As a prerequisite to an intelligent determination of the terms under which the debtor is to remain in possession, the statute requires that the court and the parties shall be informed of the fair value of the property."

From p. 315:

May 27, 1936 the farmer debtors and creditor stipulated and the District Court held that payments be made direct from farmer dectors to creditor.

June 10, 1937 a similar stipulation was entered into and ordered.

December 20, 1937 a similar stipulation was again entered into and ordered.

March 7, 1938 a similar stipulation was effected.

May 24, 1938 the farmer debtors petitioned for appraisal and stay but upon petition of the creditor the Court ordered the property sold. The farmer debtor then appealed.

This Court held that the previous stipulations and orders were ineffective to constitute the statutory stay period.

Page 317:

> "Instead of prosecuting the cause before the Conciliation Commissioner pursuant to the debtors' petition, the bank resorted to a procedure not contemplated by the statute, evidently on the theory that it could obtain some advantage by that course. By written stipulations the bank consent to the retention of possession by the debtors and arranged that they should cooperate in the cultivation of the farm, proceeds of the crops being used for further cultivation and conservation of the real estate, for payment of taxes, and for payments to the debtors."

No. 8A. *Bowman v. Loperena*, (1940), 311 U. S. 262. This was a proceeding under Section 74 of the Bankruptcy Act for the relief of individual debtors. The procedural facts are involved. For the present purpose they were as follows:

The District Court entered an order of adjudication on August 21, 1936. The time for appeal expired in thirty days on September 20, 1936. More than a year later on November 15, 1937, a petition for rehearing was filed out of time and not disposed of by the District Court until February 17, 1938, when it was denied. On appeal, taken on March 18, 1938, which was twenty-nine days after the petition for rehearing was denied, the Appellate Court

held that the time for appeal from the district court had long since expired. This court granted certiorari, and at page 266 of the opinion said:

> "Treating the petition of September 10, 1936, and the motion of October 14, 1936, as petitions for rehearing of the order of adjudication, and the **petition of November 15, 1937, as a second petition for rehearing filed out of time**, the endorsement upon the latter by a judge of the court, and the hearing held and the opinion announced upon it, show that it was entertained by the court and dealt with upon its merits. Until the order of February 17, 1938, no final decision was rendered sustaining the adjudication as against the debtor's attack.
>
> These circumstances enlarged the time for taking appeal from the order of adjudication. The filing of an untimely petition for rehearing which is not entertained or considered on its merits or a motion for leave to file such a petition out of time, if not acted on or, if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing, and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial and the time for appeal runs from the date thereof."

The opinion cited:

Wayne v. *Owens-Illinois*, No. 62 page 46 of this brief;

Gypsy v. *Escoe*, No. 22 page 19 of this brief;

Morse v. *United States*, No. 35 page 29 of this brief.

No. 9. *Boyd* v. *Glucklich*, CCA 8 (1902), 116 Fed. 131. A referee in bankruptcy issued notice of the first creditors meeting. The bankrupt received the notice. At the creditors' meeting the referee issued an order to the bankrupt to turn over certain money. Upon petition for review the order was sustained.

Upon appeal the Appellate Court said:

"Dispatch in judicial proceedings is commendable, but, in proceedings involving the liberty of a citizen, he has a right not only to be informed of the precise claim against him, but, after receiving that information, he has a right to a reasonable time to prepare his answer and present his proofs, and, lastly, to be heard by counsel on the law and facts of the case. While proceedings in bankruptcy may be summary, they should not be too summary; in other words, they should not be so summary as to deprive the bankrupt of those fundamental rights and privileges that belong to every citizen, among which are the right to be advised of the demand made upon him, and the right, after being so advised, to have a reasonable time to prepare his defense and produce his witnesses. The Bankrupt Act does not do away with these rights, and no citizen forfeits them by being adjudged a bankrupt.'

No. 10. *Brockett* v. *Brockett*, (1844), 43 U. S. (2 How.) 238. Time for appeal ten days. Petition to open decree filed after time in sixteen days. Referred to master. Report of master. Court refused to open decree. Appeal to this court. Motion to dismiss because time to appeal had expired.

At page 240:

"The next ground is, that an appeal has been taken from the refusal of the court below to open the former decree, rendered for the appellant. It is plain that no appeal lies to this court in such a matter, as it rests merely in the sound discretion of the court below. And if this had been the sole appeal in the case, the appeal must have been dismissed. But an appeal has also been taken to the first decree (which was a final decree) rendered by the court. That decision was rendered on the 10th day of May, 1843. During the same term a petition was filed by the defendants on the 26th day of the same month, to have the final decree

opened for certain purposes; and the court took cognizance of the petition and referred it to a master commissioner. His report was made on the 9th of June following the same term still continuing; and the court then refused to open the final decree; and from this refusal as well as from the final decree, the defendants took an appeal, and gave bond with sufficient sureties, on the 15th of the same month, and the appeal was then allowed by the court. Before that time the court had not fixed the penalty of the bond.

Now the argument is that as the original final decree was rendered more than one month before the appeal, it could not operate under the laws of the United States as a supersedeas, or to stay execution on the decree; because to have such an effect the appeal should be made and the bond should be given within ten days after the final decree. But the short and conclusive answer to this objection is that the final decree of the tenth of May was suspended by the subsequent action of the court; and it did not take effect until the 9th of June, and that the appeal was duly taken and the appeal bond given ten days from this last period."

No. 10A. *In re Burr*, CCA 2 (1914) 217 Fed. 16.

"It is of course, true that as a general rule the power of the court to modify its orders expires with the term. But there are no terms in bankruptcy and the principle which the learned counsel invokes that a court has no power to vacate its order other than at the term in which it was granted is inapplicable to the facts in this case."

Cites:

Sandusky v. *First National*. No. 47 at page 36 of this brief.

No. 11. *Cameron* v. *National* (1921), CCA 8, 272 Fed. 874. Adjudication of bankruptcy. Time for appeal ten days. After fourteen days petition to vacate. Adjudication vacated. Thereafter second order of adjudication and ap-

peal therefrom within ten days. Argued that the Appellate Court had no jurisdiction because the petition to vacate was not filed "within the time allowed for an appeal." It was held that the first adjudication was vacated and that the appeal was from the second adjudication. "We therefore have jurisdiction".

No. 12. *Carpenter* v. *Condor*, (1939) 108 Fed. (2d) 318. Page 318: "The time for appeal began to run upon the denial of the petition for rehearing, although it would have been otherwise had the petition not been entertained."

The opinion cites *Morse* v. *United States*, No. 35 page 29 of this brief, in which the petition for rehearing was filed long after the time for appeal had expired.

No. 13. *Chicago* v. *Basham* (1919) 249 U. S. 163. The Supreme Court of the State of Iowa affirmed a state court decision on November 26, 1915. Petition for rehearing was overruled on April 17, 1916. A second petition for rehearing was overruled on December 18, 1916.

On a writ of error to this court the question was when the judgment of the Supreme Court of Iowa became final. This court held that it was not final until the second petition for rehearing was denied.

At page 167 this court said:

"It is only a judgment marking the conclusion of the course of the litigation in the courts of the state, that is subject to our review. Hence, whatever its form of finality, if a judgment be in fact subject to reconsideration and review by the state court of last resort through the medium of a petition for rehearing, and such a petition is presented to, and entertained and considered by the court, we must take it that, by the practice prevailing in the state, the litigation is not brought to a conclusion until this petition is disposed of, and until then the judgment previously ren-

dered cannot be regarded as a final judgment within the meaning of the act of Congress. It results that in the present case the judgment of the Supreme Court of the state of Iowa did not become a 'final judgment' until December 18, 1916, . . ."

This court cited *Andrews* v. *Virginian*, No. 3 at page 3 of this brief.

No. 14. *Citizens* v. *Opperman* (1919), 249 U. S. 448. Replevin by judgment in state court. A petition for rehearing was overruled on May 18, 1917. The case came to this court on error.

This court said at page 449:

"A petition to rehear was overruled May 18, 1917 and at that time the judgment below became final for purposes of review here."

Page 450:

"Where a petition for rehearing is entertained, the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of, and the three months' limitation begins to run from date of such denial or other disposition."

The court cited:

Andrews v. *Virginian*, No. 3 page 3 of this brief;
Chicago v. *Basham*, No. 13 at page 11 of this brief.

No. 14A. *Clarke* v. *Hot Springs*, 10 C. C. A. (1935) 76 Fed. (2d) 918.

"A petition for rehearing seasonably filed within the time for appeal will toll the time for appeal. But the petition was not filed within time for appeal. A petition for rehearing cannot resurrect a right of appeal which has expired. If filed within the term, even after the time for appeal has expired, the trial court may

grant it, thus vacate the decree and start again. But if the rehearing is denied, the original decree stands, and the right of appeal is not revived. All this has been carefully spelled out by the courts."

No. 15. *Coe* v. *Armour*, 237 U. S. 413.

Page 426:

"In doing this the court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. To do this without his consent—and the record shows no consent—is contrary to fundamental principles of justice."

No. 16. *Conboy* v. *First National* (1906), 203 U. S. 141, 146. District Court affirmed allowance of claim in bankruptcy. Circuit Court of Appeals affirmed January 23, 1905. Time to appeal to Supreme Court thirty days. Petition to recall mandate filed April 25, 1905. Denied. Petition for rehearing of the original affirmance was filed May 8, 1905. Denied May 24, 1905. Appeal allowed by a Justice of the Supreme Court May 27, 1905. The appeal was dismissed.

The opinion contains this statement at page 145:

"The cases cited for appellant, in which it was held that an application for a rehearing made before the time for appeal had expired, suspended the running of the period for taking an appeal, are not applicable when that period had already expired."

The cases cited do not support that statement. There were eight of them:

Brockett v. *Brockett*, No. 10 page 9 of this brief;

Aspen v. *Billings*, No. 4 page 3 of this brief;

Voorhees v. *Noye*, No. 60 page 45 of this brief.

Slaughter House Cases, No. 49 page 37 of this brief;

Washington v. *Bradley*, No. 61 page 46 of this brief.

Memphis v. *Brown*, No. 32 page 26 of this brief;

Texas v. *Murphy*, No. 52 page 39 of this brief.

Kingman v. *Western*, No. 30 page 24 of this brief.

The total result of an examination of the citations referred to in the *Conboy* opinion just quoted is that in four of the cases (*Brockett* v. *Brockett*, No. 10 page 9 of this brief; *Washington* v. *Bradley*, No. 61 page 46 of this brief; *Slaughter House cases*, No. 49 page 37 of this brief), and *Memphis* v. *Brown*, No. 32 page 26 of this brief) the application for rehearing came after time for appeal. In one case (*Texas* v. *Murphy*, No. 52 page 39 of this brief), it is not shown when the application was filed, but time for appeal was sixty days and the application was disposed of in 126 days and the decisions cited and followed and the reasoning in the opinion were based on applications made after time for appeal. See the digest of *Texas* v. *Murphy*, No. 52 page 39 of this brief. In the three other cases cited to the court in the *Conboy* case (*Aspen* v. *Billings*, No. 4, page 3 of this brief; *Voorhees* v. *Noye*, No. 60 page 45 of this brief; and *Kingman* v. *Western*, No. 30 page 24 of this brief, the application came within time for appeal.

It is very clear that the *Conboy* case was not properly presented for the cases rejected by the court were five to three against the decision. This court in *Wayne* v. *Davis-Illinois* (No. 62 page 46 of this brief) was justified in saying in Note 2 that the *Conboy* case "adverted to the question without deciding it."

The Appellate Court at R. 213 made this statement:

> "Appellant's petition for rehearing was filed merely for the purpose of reviewing and extending the time for filing a petition for review, under which state of facts the court in the *Wayne* case said an appeal

should be dismissed. The leading case on this subject seems to be *Conboy* v. *First National Bank*, 203 U. S. 141, [No. 16 page 13 of this brief] where the question is fully discussed."

Counsel for the petitioner has made a minute study of the *Conboy* case, including copies of papers in the files, eliciting the foregoing and the following facts about it.

Contrary to the statement from the opinion of the Appellate Court just quoted, the *Conboy* opinion does not discuss the subject of a petition for rehearing filed merely to create time for appeal. It flatly decides that a petition for rehearing filed after time for appeal has expired does not extend the time for taking appeal. The nearest it comes to the subject of a petition for rehearing filed "merely" to extend time for appeal is in these words:

Page 145:

"Appellant might have made his application for rehearing and had it determined within the thirty days, and still have had time to take his appeal. But he let the thirty days expire, as it did February 22, 1905, and did not file his petition until May 8, 1905. The right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing."

Here are the facts:

January 23, 1905—Order of Circuit Court of Appeals affirming District Court.

February 20, 1905—This court decided *Western* v. *Brown*, 196 U. S. 502.

February 22, 1905—Thirty days for appeal expired.

April 25, 1905—Petition to recall mandate filed. This petition averred that the mandate had issued without notice, that on hearing of it the appellant, a trustee in bank-

ruptcy, called a meeting of the creditors on March 3, 1905, to be held March 30, 1905. That while the creditors' meeting was pending he heard of the decision of this court in *Western* v. *Brown*, 196 U. S. 502, which established a different rule of applicable law.

May 8, 1905—Petition for rehearing filed, setting up the applicable rule announced in *Western* v. *Brown*, 196 U. S. 502, decided February 20, 1905 and published March 15, 1905.

Now, as the decision in *Western* v. *Brown*, 196 U. S. 502, was not announced until February 20, 1905, and published March 15, 1905, it could not be said that the appellant could have made his application for hearing "and had it determined within thirty days and still have had time to take his appeal." The fact is that the *Conboy* decision is a lonely minority among the numerous decisions made long before and since holding the opposite.

No. 17. *In re Fergus Falls*, District Court, Minnesota (1941) 43 Fed. Supp. 355. Upon objection to a petition for review, it was asserted that the time for filing it had expired before it was filed and that the referee had no power to grant an extension of time. The court held that a petition for review may be filed after the lapse of more than ten days from the date of the entry of the order to be reviewed. The referee had authority to extend the time for filing such petition.

No. 18. *First* v. *Belle Fourche*, CCA 8 (1907), 152 Fed. 64.

From page 74 of the opinion:

"A proceeding in bankruptcy is a continuous suit. There are no terms in the bankruptcy court. It is al-

ways open and until the termination of the pending suit that court has the power to reexamine its orders therein upon a timely application in an adequate form."

The opinion cited:

Sandusky v. *National Bank*, No. 47 at page 36 of this brief.

No. 19. *In re Frank*, CCA 8 (1910), 182 Fed. 794. A referee in bankruptcy issued notice of the first creditors' meeting. The bankrupt had notice. At the meeting the trustee presented a petition for an order on the bankrupt to turn over the money. The referee issued an order on the bankrupt to appear within three days to show cause why he should not comply. On the day set the bankrupt presented objections to the form of the petition which were overruled and he was ordered to stand by ready to appear. On the next day the matter was continued. After three days witnesses were examined by deputy in absence of the bankruptcy and without notice.

On appeal the Appellate Court said:

"It is true that the case before us differs from the *Busser* case in that the petitioner here was given two days' notice of the hearing upon the petition filed by the trustee. But that petition was based upon alleged disclosures of the petitioner when under examination before the petition was filed, and when he had no notice that his examination was to be used or would be used upon the hearing of the petition that was subsequently filed; and afterwards further testimony was taken to be used against him upon the hearing, no notice of the taking of which was given and no opportunity afforded him to appear and cross-examine the witnesses; in fact it appears that the petitioner was detained at Minot, N. D., by order of the referee at the instance

of the trustee while such testimony was being taken. It therefore clearly appears that the order of the referee deprived the petitioner of his legal rights, and in respect of the taking of the testimony is in effect the same as the order in *Re Rosser*."

No. 20. *Galpin* v. *Page*, 85 U. S. (18 Wall.) 350.

Page 368:

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

No. 21. *Goddard* v. *Ordway* (*Phillips* v. *Ordway*) (1880), 101 U. S. (11 Otto) 745. Appeal from a United States Court to this court. After appeal was allowed but within term a motion was made to vacate the order appealed from and for reargument.

The court said:

At page 1042 of the L. Ed. (25 L. Ed. 1040):

"The objections urged to the jurisdiction were: 1, that a court cannot reverse or annul its final decrees or judgments for error of fact or law after the term at which they were rendered;" . . . "So far as the first objection is concerned, it is sufficient to say that the motion to vacate the order of affirmance and grant a reargument was made to and recognized by the court at the same term the order was entered, and before a final adjournment. This is evident from the fact that the motion was entered on the minutes of the doings of the court for the Term. A paper may be filed in the proper office and yet not brought to the attention of the court while sitting in judgment, but

when what it calls for appears on the minutes of actual proceedings, it must be presumed that the court, in some form, gave it judicial attention, and that it was presented in some regular way."

. . .

"The motion, when entertained, prolongs the suit, and keeps the parties in court until it is passed upon and disposed of in the regular course of proceeding."

No. 22. *Gypsy* v. *Escoe* (1927), 275 U. S. 498.

"Per Curiam: This petition for certiorari to the supreme court of the state of Oklahoma is denied.

The application was not made in accordance with Section 8(a), Act of February 13, 1925, which provides: 'No writ of error, appeal, or writ of certiorari shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree. . . .'

The judgment of the Supreme Court was entered March 22, 1927. A timely petition for rehearing was denied June 14, 1927. On June 18, 1927, an application for leave to file a second petition for rehearing was indorsed:

'Leave granted to file—Fred C. Branson, Chief Justice.'

On August 2, 1927, as appears from the minutes, the following proceedings were taken by the court: '*Gypsy Oil Company* v. *Escoe, et al.* Application for leave to file a second petition for rehearing denied; application for oral argument denied. Fred C. Branson, Chief Justice.'

On September 30, 1927, more than three months after denial of the petition for rehearing (June 14), the present petition for certiorari was filed.

The running of the time within which proceedings may be initiated here to bring up judgment or decree for review is suspended by the seasonable filing of a

petition for rehearing. But it begins to run from the date of denial of such petition and further suspension cannot be obtained by the mere presentation of a motion for leave to file a second request for rehearing.

If, however, a timely motion for leave to file the second petition is granted, and the petition is actually entertained by the court, then the time within which application may be made here for certiorari begins to run from the day when the court denies such second petition."

No. 23. *In re Hamilton*, CCA 7 (1913), 209 Fed. 596.

From page 598 of the opinion:

"We are of the opinion that so long as the bankrupt's estate is pending in the court and unsettled, the court has, under the bankruptcy Act, and especially under Section 2, Chapter 2 thereof, power over its orders and records as to the disposition of claims, to modify the same to conform to the rights of the parties, and that therefore the referee was not, in the present case, estopped from permitting said amendment and to the allowance of the claim in accord with the prayer of the amended petition, by his former order disallowing the claim as then presented."

No. 24. *Hardin* v. *Boyd*, 1885, 113 U. S. 756. Suit to set aside conveyance. Petition for rehearing.

This court said at the end of the opinion:

". . . it is sufficient to say that the granting of a rehearing was a matter within the discretion of the court below and not to be reviewed here."

No. 25. *Harris* v. *Mills*, CCA 10 (1939), 106 Fed. (2d) 976.

"By order dated December 2 and filed December 15, 1938, the court found that the bankrupt was not a wage earner and denied the motion to dismiss; by order

dated January 18, and filed January 30, 1939, the court denied the motion of the bankrupt for a rehearing on the motion to dismiss; . . . "

. . . . .

"The petitioning creditors lodged in this court a motion to dismiss the appeal on two grounds. The first is that the appeal from the order of December 2, finding that the bankrupt was not a wage earner and denying the motion to dismiss the petition, was not taken within the time allowed by section 25 of the Bankruptcy Act."

. . . . . .

"Here a motion to set aside the order dated December 2, and to grant a rehearing on the motion to dismiss the petition, was filed December 9, and not disposed of until January 18, 1939. Treating the order of December 2 as a reviewable order, we think the time within which to appeal therefrom was suspended during the pendency of the motion for rehearing. The appeal was seasonably perfected after the denial of that motion. But the motion for rehearing was addressed to the sound judicial discretion of the trial court, and its denial is not the subject of appeal."

Citing:

Wayne v. *Owens-Illinois*, No. 62 at page 46 of this brief.

No. 26. *Holden* v. *Hardy*, 169 U. S. 366.

Page 389:

"It is sufficient to say that there are certain immutable principles of justice which adhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense."

No. 27. *In re Ives*, CCA 6 (1902), 113 Fed. 911.

At page 913 of the opinion it is said:

> "Under the Bankruptcy Act of 1867 the District Court . . . is always open and has no separate terms; proceedings in a pending suit are open for reexamination . . . and any order made in the progress of the case may be subsequently set aside . . . provided rights have not become vested under it which would be disturbed by its vacation; . . . this language used in referring to the Act of 1867 was said by this court to be applicable to the present act" [of 1898] . . . "We are of opinion therefore that the question presented by the petitioner was open, and the court below had power to determine it although several terms of the district court had expired since the adjudication."

The opinion cited:

Sandusky v. *First National*, No. 47 at page 36 of this brief.

No. 28. *In re Jayrose*, (CCA 2) (1937), 93 Fed. (2d) 471. Referee's order in 1936 denied priority of claim and allowed as a general claim. No petition for review was filed by the creditor. More than a year later the creditor orally applied at a creditors' meeting for priority on the basis of a subsequent decision of this court. The referee denied the application and reported to the District Court which ruled that the creditor was estopped. There was no allowance of a rehearing, merely a denial of the application to revise the original order. The creditor appealed. Eleven months after the decision of this court in *Wayne* v. *Owens-Illinois* the Circuit Court of Appeals for the Second Circuit in its opinion said: "... it is settled here that referees have power to grant rehearings even after the time for review of their orders by the District Court has expired . . ."

"Although no appeal lies from a denial of a rehearing, an order entered upon a granted rehearing is appealable, although the court reaffirm its former action. Although not in form a motion for a rehearing of the prior orders of allowance, in effect it was just that. ". . . "While no formal order was entered reaffirming his prior action in allowing the claim as a general claim, his report to the court may be considered an indirect order to that effect" . . . "The court should have modified and corrected the referee's report . . . The court has jurisdiction to make that correction and it is ordered."

No. 28A. *In re Jemison Mercantile Company*, CCA 5 (1902) 112 Fed. (2d) 966.

"In . . . bankruptcy proceedings no such limitation obtains or rather the whole period from the filing of the petition to the final settlement of the proceedings constitutes but one term."

Cites:

Sandusky v. *National Bank*, No. 47 at page 36 of this brief.

No. 29. *John Hancock* v. *Bartels*, (1939), 308 U. S. 180.

At page 185 this court said:

"The procedure under subsection (s) is intended to protect all interests. It provides, in paragraph (1), that after the value of the debtor's property has been fixed by the prescribed appraisal, the referee shall set aside the debtor's unencumbered exemptions and direct his retention of possession of the rest of his property subject to all liens and to the court's supervision and control. Under paragraph (2), if there has been compliance with the statutory conditions, **the court is directed to stay all proceedings against the debtor or his property for a period of three years**, and during

that time the debtor may retain possession of all or part of his property subject to the court's control, provided he pays a reasonable rental semi-annually."

No. 30. *Kingman* v. *Western*, 170 U. S. 675, 678. Time for application for certiorari six months. Rule required motion for new trial within three days. It was filed in two days.

At page 678:

"The motion for new trial in this case was filed within three days after the return of the verdict, and seasonably within the rule of the state statute, or the common law rule, and, it is said, within the rule enforced by the United States courts in that district. No leave to file it was required, and as it was entertained by the court, argued by counsel without objection, and passed upon, it must be presumed that it was regularly and properly made. This being so, the case falls within the rule that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal."

Here the opinion cited

Aspen v. *Billings*, No. 4 page 3 of this brief;
Voorhees v. *Noye*, No. 60 page 45 of this brief;
Brockett v. *Brockett*, No. 10 page 9 of this brief;
Texas v. *Murphy*, No. 52 page 39 of this brief;
Memphis v. *Brown*, No. 32 page 26 of this brief,

all of which state the general principle that an application for rehearing, whether filed before or after time for appeal suspends the finality of the order until the application for rehearing is ruled upon.

No. 31. *In re Madonia*, District Court Illinois (1940) 32 Fed. Supp. 165.

Note: This opinion is by the same judge, of the same court, who shortly thereafter issued the inconsistent orders in this *Pfister* case dismissing petitions for review on the ground that the court was without jurisdiction to hear them.

From the opinion:

"Section 39(c) of the Chandler Act provides:

> '(c) A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy thereof upon the adverse party who were represented at such hearing . . .'

It is the position of the trustee that the provisions for filing the **petition for review** and serving a copy upon the adversary are jurisdictional and that if the petition is not filed and the copy served within the ten day period (unless the court has within the ten days granted an extension) the **referee is without power to grant the petition or the judge to hear it.**

I cannot agree. Statutes granting a right of review of the order of a court should be liberally construed, so that if error occurs it may be corrected.

Here the statute gives the court power to extend the time within which the petition should be filed, and the court's power in this respect is not limited to the ten-day period. I am of the opinion that the court has discretion, within reasonable limits, to grant the extension after the expiration of the ten day period. The Circuit Court of Appeals of the Third Circuit has so held."

No. 32. *Memphis* v. *Brown* (1877), 94 U. S. (4 Otto) 715. Time for writ of error sixty days. Motion to set aside thereafter in seventy-eight days.

> "Under the ruling in *Brockett* v. *Brockett* [No. 10 page 9 of this brief], the motion made during the Term to set aside the judgment of March 2 suspended the operation of that judgment so that it did not take final effect for the purposes of a writ of error until May 20 when the motion was disposed of."

No. 32A. *In re Mercur*, CCA 3 (1903) 122 Fed. 384.

> "As a preliminary matter it may be observed that there is no such finality to the proceedings that we can not even at this late state revise and amend them if otherwise authorized. The general right to amend, regardless of the time which has elapsed, is abundantly sustained by the authorities."

Cites:

Sandusky v. *First National*, No. 47 at page 36 of this brief.

No. 33. *Miller* v. *Hatfield*, (CCA 6), (1940), 111 Fed. (2d) 28. A conciliation commissioner ordered a farmer debtor to pay into court within thirty days a sum as rental which the farmer debtor withheld as having spent for upkeep of the estate. Upon default of payment the conciliation commissioner ordered liquidation and appointed a trustee under Section 75 (s) (3) who filed a petition to sell to which the farmer debtor filed an answer. The answer was stricken because previous orders had been violated and no petition for review had been filed and time had expired for doing so. Sale was ordered and a petition for review of it and of the previous orders was filed.

The District Court denied the petition for review for lack of jurisdiction. The Appellate Court reversed the Dis-

trict Court. The following is quoted from the opinion of the Appellate Court.

"Under section 39(c), of the Bankruptcy Act as amended by the Act of June 22, 1938, 'a person aggrieved by an order of a referee may, within ten days after the entry thereof or may within such extended time as the court may, for cause shown, allow, file with the referee a petition for review of such order.'

Before the enactment of the above statute in districts where local rules of court prescribed a definite period for filing of petitions for review or thereafter by leave of court where proper cause therefore was shown the courts entertained petitions which had not been filed until after the expiration of the arbitrary period."

. . . . .

"The question for decision is whether the orders of September 27 and November 8, 1937, are of such finality as to prohibit the conciliation commissioner from granting a rehearing. There is some conflict of opinion in regard to the power of a referee in bankruptcy over his own orders, but we believe the correct rule as applied to farmer-debtor proceedings is that the conciliation commissioner has the same power to vacate his order as has a court during the term and as the bankruptcy court has no term, the conciliation commissioner has the power to vacate any order entered during the course of the proceedings unless rights have intervened which it would be inequitable to disturb."

. . . . .

"Appellant's objection to the order of sale was substantially a petition for rehearing on the two provisional orders and in our opinion, no intervening rights appearing and diligence being shown, the conciliation commissioner, upon the application was authorized to, and should have, granted a rehearing on the merits. The two orders which appellee insists were of such finality as to start the period of limitation for

filing petition for review were preliminary to the order of sale and were so closely intertwined with it as to justify the conclusion that there was but one final order which was the one of sale of January 18, 1938, and the time for filing the petition for review to the judge ran from the date of its entry.

Bankruptcy procedure on the whole is void of legal technicalities and flexible to accomplish its purpose of administering substantial justice. In ordinary bankruptcy, it is important that the estate should be administered promptly to the end that the debtor's property should be distributed to his creditors and the bankruptcy discharged. Section 75(s) presupposed the farmer would continue his business and in the very nature of such proceedings; it is essential, in carrying out the purpose of the Act, that wide latitude be given to the conciliation commissioner to revise and review orders entered in the course of the proceedings relating to the business of the bankrupt with due regard to the rights of vested interests.

It follows from this that the lower court had jurisdiction to review the orders of the conciliation commissioner and erred in not considering the petition on its merits."

The opinion cites:

Re Pottash Brothers Company, No. 40 page 32 of this brief;

Wayne United Gas Co. v. Owens-Illinois Glass Company, No. 62, page 46 of this brief.

In re Jaycrose Millinery Co., No. 28, page 22 of this brief.

No. 34. *Morgan v. United States* (1938), 304 U. S. 1. The validity of an order of an executive department was involved. There were legal notice, taking of testimony by examination and cross examination, oral arguments, briefs,

findings, rehearing, a new hearing, more oral argument and more briefs. The findings were then issued without first presenting them to the parties concerned.

This Court continued a long history of judicial pronouncements by holding that even in an administrative proceeding which is only quasijudicial in character, the liberty and property of citizens must be protected by fair and open hearing. In that case there was an open hearing and argument but there was no opportunity given to the person involved to examine the order before it was issued.

At page 18, the Court said:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them."

No. 35. *Morse* v. *United States* (1926), 270 U. S. 151. Time for appeal three months. Motion for new trial filed within time in one month and twenty-six days. Overruled.

Rule of court required leave of court to file motion for new trial after ninety days. Motion for leave filed after ninety days and denied. It was argued that filing a motion for leave to file a motion for new trial stopped the running of time for appeal.

> Page 153: "There is no doubt under the decisions and practice in this court that where a motion for a new trial in a court of law, or a petition for a rehearing in a court of equity, is duly and seasonably filed, it suspends the running of the time for taking a writ of error or an appeal, and that the time within which the proceeding to review must be initiated begins from the date of the denial of either the motion or petition."

> Page 154: "The suspension of the running of the period limited for the allowance of an appeal, after

a judgment has been entered, depends upon the due and seasonable filing of the motion for a new trial or the petition for rehearing. In this case, after the first motion for a new trial had been overruled, on May 4, 1924, no motion for a new trial could be duly and seasonably filed under Rule 90 of the court of claims, except upon leave of the court of claims. This leave, though applied for twice, was not granted. Applications for leave did not suspend the running of the ninety days after the denial of the motion for a new trial within which the application for appeal must have been made."

The opinion cites eight cases:

Brockett v. *Brockett*, No. 10 page 9 of this brief;
Washington v. *Bradley*, No. 61 page 46 of this brief;
Memphis v. *Brown*, No. 32 page 26 of this brief;
Texas v. *Murphy*, No. 52, page 39 of this brief;
Aspen v. *Billings*, No. 4 page 3 of this brief;
Kingman v. *Western*, No. 30 page 24 of this brief;
U. S. v. *Ellicott*, No. 56 page 42 of this brief;
Andrews v. *Virginian*, No. 3 page 3 of this brief; and
Chicago v. *Basham*, No. 13 page 11 of this brief,

all of which, as shown, establish the general principle relied upon.

This decision now being digested (*Morse* v. *United States*) clearly distinguishes between an application for rehearing and an application for leave to file an application for rehearing. In *Gypsy* v. *Escoe* (1927) (No. 22 page 19 of this brief), the same distinction is clearly repeated.

No. 37. *In re Nelson*, District Court Nebraska. (1941) 41 Fed. Sup. 221. It was argued that the stay in a farmer

debtor proceeding should start as of the filing of the amended petition under Section 75 (s).

The court held that the stay begins only with the entry of the stay order and that an appraisal, which can only be made after the amended petition is filed, is a prerequisite to the entry of the stay order.

No. 38. *Northern* v. *Holmes*, (1894), 155 U. S. 137.

At page 138 of the opinion it was said:

> "It is well settled that if a motion or petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal."

The opinion cited:

Aspen v. *Billings*, No. 4, page 3 of this brief;
Voorhees v. *Noye*, No. 60, page 45 of this brief.

No. 39. *Paradise* v. *Federal*, CCA 10 (1941), 118 Fed. (2d) 215. In a farmer debtor proceeding the entry of a stay order was inadvertently omitted. On August 7, 1940, the district court entered an order which is related in the opinion as follows:

> "On August 7, 1940, the District Court found that the debtor was adjudged a bankrupt under section 75, sub. (s), on June 16, 1938; that the matter was referred to the conciliation commissioner; that an appraisal of the property of the bankrupt was duly made and filed; that the conciliation commissioner fixed the annual rental and awarded possession of the property to the debtor; that on September 8, 1938, the conciliation commissioner filed his report recommending a stay and that, through inadvertence, the formal stay order was not entered; and ordered that 'all judicial or offi-

cial proceedings in any court, or under the direction of any official, against the said bankrupt or any of its property, be and the same are hereby stayed for a period of three years from and after September 8, 1938, and this order shall be entered and take effect *nunc pro tunc* as of September 8, 1938.' "

On appeal the Appellate Court said:

"The stay provided for is not an automatic stay but a judicial one, to be granted only after a finding by the court that the conditions set forth in the section have been complied with."

. . . . . .

"Since the stay order fixes the beginning of the three-year period during which the debtor must pay rent, and the beginning of the maximum period within which the debtor must pay the first year's rental, we are of the opinion that **the court was without power to give retroactive effect to its order of August 7, 1940, and start the running of the three-year period as of September 8, 1938,** and place the debtor in default for nonpayment of rent for 1938. We conclude that the three-year period must be held to have commenced on April 1, 1940; that the debtor's obligation to pay rental commenced on April 1, 1940; and that the debtor should be required to pay rental for 1940 and during the remainder of the three-year period in accordance with the order of the conciliation commissioner of April 23, 1940."

No. 40. *In the Matter of Pottasch; Central* v. *Irving*, (CCA 2) (1935), 79 Fed. (2d) 613: A referee's order in 1932 closed a bankruptcy estate and discharged the trustee. Thereafter some assets deemed worthless were realized upon and the estate was reopened two years later. A creditor then asked the referee to amend an order made before the case was closed. The referee refused. No rehearing was allowed. The referee merely refused to amend his original order.

The following quotations from the opinion explain the situation and the holding of the Circuit Court of Appeals on appeal from the District Court:

> "This order the referee signed on April 15, 1932, the accounts, etc., were assigned, the estate was thereafter closed and the trustee discharged.
>
> Nobody had thought about the claims for the refund of customs duties, and the trustee's attorney did not even know of them, although they were mentioned in the claim as filed. Most of them were eventually dismissed, but in due course, some were allowed to the extent of about $11,000. Thereupon the estate was reopened in the autumn of 1934, and the trustee was reappointed so that the recovery might be distributed." . . .
>
> "Thereupon, the petitioner asked the referee to amend the order so that it should conform to the petition, but the referee refused to do so, holding that he was without power to vacate or modify any of his orders."
>
> . . . . .
>
> "It is clear therefore that the order should be amended, unless the referee had no power to amend it; it did not embody the parties' intent." . . . "The only question therefore is whether the referee had power to amend it."
>
> . . . . .
>
> "We hold that a referee has the same power over his orders as the district judge has over his."

No. 41. *Potter* v. *Union Central* (1939), 308 U. S. 524; CCA 6 (1939) 102 Fed. (2d) 1010; CCA 6 (1940) 111 Fed. (2d) 145. The report of a special master recommended and the final order of the District Court dismissed a farmer debtor proceeding. The original final order of the Circuit Court of Appeals reads:

"It appearing to the court that appellant failed to file exceptions to the master's report within the period prescribed by Rule 13 of the Bankruptcy Rules of the District Court for the Northern District of Ohio; it is ordered that the motion of the appellees be sustained and the appeal dismissed." 102 Fed. (2) 1010.

The judgment of this Court on petition for certiorari reads:

"The petition for certiorari is granted. As the appeal from the order of the District Court filed December 4, 1937, was duly perfected, the Circuit Court of Appeals had jurisdiction and its order dismissing the appeal was error. The order is reversed and the cause remanded to the Circuit Court of Appeals for further proceedings." 308 U. S. 524.

Upon receipt of the mandate from this court the Circuit Court of Appeals after considering the stipulation of counsel overruled the motion by appellees to dismiss the farmer debtor proceeding and the decision of the special master and the decision of the District Court was reversed. 111 Fed. (2) 145.

No. 42. *In re Regozinno* (District Court New York 1941), 37 Fed. Supp. 524. Referring to the Third Circuit Decision in *Thummess* v. *Von Hoffman*, No. 53 page 40 of this brief, the opinion says:

"The more liberal view taken in *Thummess* v. *Von Hoffman* will be followed here. The provision in question was not intended to be treated as a statute of limitation."

No. 43. *Roemer* v. *Bernheim* (*Roemer* v. *Neumann*), (1899), 132 U. S. 103. Suit for patent infringement dismissed. Motion for rehearing which the court declined to entertain. A "formal petition for a rehearing" then

filed. The court granted rehearing "upon condition that plaintiff shall pay to the defendant all costs" to date.

On appeal to this court it was said in its very short opinion:

> "The granting or refusal, absolute or conditional, of a rehearing in equity, as of a new trial at law, rests in the discretion of the court in which the case was heard or tried and is not a subject of appeal."

No. 44. *In re Rosser*, CCA 8 (1900), 111 Fed. 106. A referee in bankruptcy issued notice of a first creditors' meeting. The bankrupt received the notice. At that creditors' meeting the bankruptcy was examined. At the conclusion of the examination the referee issued an order upon the bankrupt to turn over $2,500 to the trustee. The bankrupt, being committed to jail for failure to obey the order, objected that he had not been notified that such an order was to be a subject of consideration at the creditors' meeting. In its decision the Circuit Court of Appeals said:

> "Such a proceeding lacks every element of due process of law. It contains no notice to the party affected of the claim against him, or of the proposed action upon it, no opportunity to contest the questions of fact which it presents by the cross-examination of the claimant's witnesses or the presentation of his own, and no chance to be heard upon the question of law which it involved. It considers without notice, condemns without hearing, and renders judgment without trial. The order of the referee was unlawful and void."

No. 45. *Rubber Company* v. *Goodyear* (1868), 73 U. S. (6 Wall.) 153. Order entered in full form in minute book on November 28, 1866. Decree in same language entered on December 5, 1866, "as of November 28, 1866." Question was when the time for appeal began to run. This

court held that if the decree of December 5, 1866, had not been entered, the order of November 28, 1866, would have been the final order but that as the decree of December 5, 1866 was entered, it dated the running of time for appeal notwithstanding it was entered "as of November 21, 1866".

No. 46. *San Pedro* v. *United States* (1892) 146 U. S. 120. On appeal from a judgment in a suit to set aside a patent deed, this court said near the end of the opinion:

> "A petition for rehearing is no more significant than a motion for a new trial, which, as well settled, presents no question for review in this court."

No. 47. *Sandusky* v. *National Bank*, (1875), 90 U. S. (23 Wall.) 289.

At page 156 of the L. Ed. (23 L. Ed. 155) this court said:

> "A proceeding in bankruptcy from the time of its commencement, by the filing of a petition to obtain the benefit of the Act, until the final settlement of the estate of the bankrupt, is but one suit. The District Court, for all the purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. Its proceedings in any pending suit are, therefore, at all times open for re-examination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation."

No. 48. *Sheets* v. *Livy*, (1938), CCA 4, 97 Fed. (2d) 674. In a farmer debtor proceeding in the "old days" when farmer debtor petitions were being dismissed for "lack of good faith" and this court had not yet stopped such dismissal by its decision in *John Hancock* v. *Bartels* (No. 29 page 23 of this brief) the District Court entered an order of dismissal without notice of hearing.

The Appellate Court said:

"There was abundant evidence, most of which was given by the debtor himself, from which lack of good faith in his proposal might readily have been inferred. Accordingly, the District Judge, acting with commendable promptness, filed an opinion nine days after receiving the commissioner's report in which he reached the conclusion that the proposal was merely a gesture which was made for the sole purpose of laying a foundation for the filing of a petition under subsection (s) of Section 75, and that in fact the debtor had made no fair and sincere offer to effect a payment of his debts through composition. He therefore found that the debtor had not made a *bona fide* effort to agree with creditors upon a composition or extension, and ordered that the amended petition be denied and the proceeding dismissed."

Yet the Appellate Court reversed the District Court, saying:

"The District Judge was nevertheless in error in denying the amended petition and dismissing the proceedings for two reasons. It was improper, no matter how strong the evidence of lack of good faith, to take this action without notice to the debtor and opportunity to be heard."

No. 9. *Slaughter House Cases* (1870), 77 U. S. (10 Wall.) 273. Judgment in state court. Time for writ of error ten days. Petition for rehearing thereafter in sixteen days.

Beginning at the top of the first column of the L. Ed. (19 L. Ed. 915) on page 920:

"Filed, as the writs of error were, within ten days from the date of the entry refusing the petition for rehearing, it is claimed by the plaintiffs that the several writs of error operate as a supersedeas to stay execution, under the 23rd section of the Judicial Act.

Doubts were at one time entertained upon that subject, but since the decision of *Brockett* v. *Brockett*, [No. 10 page 19 of this brief], the question must be considered as settled in accordance with the views of the plaintiffs. *Rubber Co. v. Goodyear* [No. 45 page 35 of this brief.]"

"Undoubtedly, the writs of error in these cases were seasonably sued out and served. . . ."

No. 50. *In re Stearns and White*, CCA 7 (1924), 295 Fed. 833. Referee in bankruptcy allowed claim. Petition for review denied February 3, 1923. Later the court again denied the petition for review "in a little different language" on February 28, 1923. Appeal was allowed but not perfected. After time for appeal had expired "the bankrupt moved 'to vacate orders of February 3rd and 28th enter new order *in re* claim of Lee, allow appeals and supersedeas, approve appeal bond and issue citation, etc.'" Motion granted by vacating orders, again denying petition for review and affirming the referee's order.

On appeal it was moved to dismiss the appeal for that when the appeal was allowed the district court was without jurisdiction.

From page 838:

"We can hardly presume that the Supreme Court intended to suggest to Wilt (*Stickney* v. *Wilt*, 90 U. S. (23 Wall.) 150) that he might file a petition which would be ostensibly for the purpose of procuring a review, but which in fact be the thing condemned by Judge Lowell as unworthy, namely a proceeding to reinvest Wilt with the right of appeal."

The appeal was dismissed.

No. 51. *Steins* v. *Franklin*, (1872), 81 U. S. (14 Wall.) 15. Suit in state court—no federal question involved.

Judgment affirmed by State Supreme Court. On petition for rehearing federal question was raised for the first time. Petition for rehearing denied. Upon error to this court it was said:

Page 848 of L. Ed. (20 L. Ed. 846, 848):

"Exceptions do not lie to the granting or refusing a new trial in a suit at law, nor will an appeal lie from the Circuit Court to this Court from an order of the Circuit Court in granting or refusing a petition for rehearing in an equity suit for the same reason, which is the motion in the one case, or the petition or motion in the other, is alike addressed to the discretion of the court, as shown in all the decisions of the federal courts."

No. 52. *Texas* v. *Murphy* (1884), 111 U. S. 488. Time for writ of error sixty days. Not shown when motion for rehearing filed. But it was heard and denied 126 days after the entry of the final order. However, in the cases cited and relied upon the applications for rehearing were filed after time. They were: *Brockett* v. *Brockett*, No. 10 page 9 of this brief; *Slaughter House Cases*, No. 49 page 37 of this brief; and *Memphis* v. *Brown*, No. 32 page 26 of this brief.

"The objection now made is, that as the judgment entered on the 21st of December was only an order overruling a motion for a rehearing, which is not reviewable here, we have no jurisdiction.

In *Brockett* v. *Brockett*, [No. 10 page 9 of this brief], it was decided that after a petition for rehearing, presented in due season and entertained by the court, prevented the original judgment from taking effect as a final judgment, for the purposes of an appeal or writ of error, until the petition was disposed of. This record does not show, in express terms, when the motion for a rehearing was made, but it was entertained

by the court and decided on its merits. The presumption is, therefore, in the absence of anything to the contrary, that [illegible] was filed in time to give the court control of the judgment which had been entered, and jurisdiction to enforce any other that might be made. This presumption has not been overcome.

The writ of error as issued is on its face for the review of the final judgment, not of the order refusing a rehearing. The judgment is sufficiently described for the purposes of identification. We are of opinion, therefore, that the judgment as entered on the 29th of May is properly before us for consideration."

No. 33. *Thummess* v. *Von Hoffman*, CCA 3 (1940), 109 Fed. (2d) 291.

From the opinion:

"The purpose of section 39, (sub. (c), as expressed by the House Committee on Judiciary at the time the proposed amendment was submitted to Congress, was to establish definitely the practice (*i.e.*, on petitions for review) in the interest of certainty and uniformity. This Congress accomplished by incorporating in the Bankruptcy Act, as section 39, sub. (c) what had been substantially the law in a number of districts under General Order 27 and local rules of court."

". . . the right to review orders of a referee is elsewhere conferred upon the bankruptcy court by a different section of the Bankruptcy Act." (Section 2(10) of the Bankruptcy Act of 1938 is the same.)

"Thus the statute (sec. 2, cl. 10) confers the right to a review, and the amendment now under consideration (section 39, sub. (c)) defines the procedure and prescribes the time within which the proceeding for review shall be commenced, just as did General Order 27 and local rules of court before the adoption of the

amendment. No question as to the jurisdiction of the bankruptcy court to entertain a petition for review is involved by Section 39, sub. (c)."

No. 54. *United States* v. *Benz*, (1931), 282 U. S. 304. Indictment under federal statute. Plea of guilty and sentence. During term and while sentence being served upon petition of the defendant the District Court shortened the sentence. Appeal to the Circuit Court of Appeals which certified to this court the question whether the District Court during term had power to shorten sentence. This court answered "in the affirmative".

Page 306:

"The general rule is that judgments, decisions and orders are within the control of the court during the term at which they are made. They are then deemed to be 'in the breast of the court' making them and subject to be amended, modified, or vacated by that court."

No. 55. *United States* v. *East*, CCA 8 (1935), 80 Fed. (2d) 134. Claim disallowed by referee in bankruptcy. Petition for review denied by district court. After time for appeal petition for review filed reciting that certain documents were necessary to be introduced as part of the record in case of appeal. The rehearing was granted and the petition for review again denied.

At page 134:

"The petition for rehearing recited that there had been a hearing on the government's claim by the District Court on October 12, 1932, and that the District Court had on that day rendered a 'decision—denying government's petition for review of the findings of the referee denying the claim of the government,' but asserted on behalf of the government that the attorney for the government had at the time of the hearing 're-

quested leave to file certain documents as a part of the record in the case' and 'had understood that time would be granted to secure and present them' and that the attorney 'was wholly unprepared for the decision of the court' against the government. The rehearing was prayed for on the ground that the documents were 'necessary—as a part of the record in the event petitioner decides to take an appeal from the decision of the court.'"

Page 135:

"The matter coming on further to be heard by the trial court on June 4, 1935, the court found 'that on October 12, 1932, after a hearing, an order was entered, denying said petition for review and affirming the order of the referee; that on January 13, 1933, upon petition filed on that day, the court granted a rehearing for the purpose of enabling the United States of America to perfect an appeal to the Circuit Court of Appeals.'

It was thereupon ordered 'that the petition of the United States of America for a review of the referee's decision be . . . denied.'"

Page 135:

"From this record it is clear that the trustee in bankruptcy obtained a final judgment of the District Court disallowing the claim of the United States against the bankrupt estate on October 12, 1932, and that the right of the United States to appeal from the order was lost to the government by its failure to take an appeal within thirty days fixed by the statute. The proceedings by which it was attempted to extend time of appeal were ineffectual to that end."

No. 56. *United States* v. *Ellicott*; (1912) 233 U. S. 524. Time for appeal 90 days. Motion for new trial in 84 days. Overruled after term and appeal after 90 days. Motion to dismiss because appeal taken too late.

"The motion is without merit. The general rule governing the subject of prosecuting error or taking appeals from final judgments or decrees is, we think, applicable to judgments or decrees of the court of claims, and the rule treats a judgment or decree properly entered in the cause as not final for the purposes of appeal until a motion for a new trial or a petition for rehearing, as the case may be, when entertained by the court, has been disposed of; and the time for appeal begins to run from the date of such disposition. It is, we think, also manifest that the appeal was taken from the hypothesis just stated, that the judgment entered did not become a final judgment for the purposes of appeal until the motion for a new trial had been disposed of."

The opinion cites *Kingman* v. *Western*, No. 30, page 24 of this brief.

No. 37. *United States* v. *Mayer*, (1914), 235 U. S. 555. Conviction in district court for federal criminal offense. Sentences imposed. A writ of error issued out of the Circuit Court of Appeals which court admitted the accused to bail. Long after term the accused gave notice of application to District Court to set aside conviction, quash indictment or for new trial. On order to the judge of the District Court to show cause the Circuit Court of Appeals certified the questions to this court.

In answering the questions submitted by the Appellate Court this court said:

Page 67:

"In the absence of statute providing otherwise, the general principle obtains that a court can not set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun at that term."

The court expressly excepted proceedings in a court of equity.

No. 58. *United States* v. *Seminole*, (1937), 299 U. S. 417. Note: The decision in this case was announced three days before *Wayne* v. *Owens-Illinois*, No. 62 page 46 of this brief, was argued.

Certiorari to Court of Claims. Rule of Court of Claims required leave of court to file a second motion for new trial. Time for filing petition for certiorari three months after judgment.

Judgment December 2, 1935. Motion for new trial overruled on March 2, 1936. Five months and eleven days after judgment motion for leave to file second motion for new trial was filed on May 13, 1936, which was granted. Second motion for new trial filed five months and sixteen days after judgment on May 18, 1936. Six months and six days after judgment second motion for new trial was overruled. Seven months and six days after judgment a petition for certiorari was filed in this court.

Thus the motion for leave to file the second motion for a new trial and the second motion for new trial and the petition for new trial were all filed long after the three months' period for filing a petition for certiorari.

It was argued that the second motion for new trial was filed under a statute (28 U.S.C. 282) which creates an exception to the general rule by not extending time for filing a petition for certiorari to this court.

This court found that the second motion for new trial was not filed under the statute but under the rule of the

Court of Claims and therefore the judgment did not become final until the motion for new trial was disposed of and the general rule of law was applicable.

Page 421:

"It is clear that the three months period, Section 350 [28 U.S.C. 350] did not commence to run until the court disposed of that motion and did not expire until long after the defendant had filed its petition for this writ. It is well settled that the time within which application may be made for review in this court does not commence to run until after disposition of motion for a new trial seasonably filed and entertained." . . . "This court has jurisdiction."

The opinion cites:

Brockett v. *Brockett*, No. 10 page 9 of this brief;
Texas v. *Murphy*, No. 52 page 39 of this brief;
U. S. v. *Ellicott*, No. 56 page 42 of this brief;
Citizens v. *Opperman*, No. 14 page 12 of this brief;
Morse v. *United States*, No. 35 page 29 of this brief;
Gypsy v. *Escoe*, No. 22 page 19 of this brief.

No. 59. *Voorhees* v. *Jackson* (1836) 35 U. S. (10 Pet.) 449.

At page 474 of its opinion this court said more than a century ago:

"If not warranted by the constitution or law of the land, our most solemn proceedings can confer no right which is denied to any judicial act under color of law which can properly be deemed to have been done *coram non judice;* that is by persons assuming the judicial function in the case without lawful authority."

No. 60. *Voorhees* v. *Noye*, (1894), 151 U. S. 135. Application for rehearing within three days. Time for appeal not shown but it was more than three days.

From page 137:

"The appeal was allowed January 7, 1891, but the decree did not take final effect as of that date for the purposes of appeal nor until February 7, 1892, because the application for rehearing was entertained by the court, filed within the time granted for that purpose and not disposed of until then."

No. 61. *Washington* v. *Bradley*, (1869), 74 U. S. (7 Wall.) 575. Time for appeal ten days. Motion to rescind filed thereafter in twenty-eight days.

There is no doubt that during the term the decision was at all times subject to be rescinded and modified, upon motion, and could not therefore be regarded as absolutely final until the end of the term. It became final in this case when the motion to rescind had been heard and denied.

No. 62. *Wayne* v. *Owens-Illinois* (1937), 300 U. S. 131. (Note: Some of the history of the procedure in this matter has been assembled from *Wayne* v. *Owens-Illinois*, 83 Fed. (2d) 98; *Wayne* v. *Owens-Illinois*, 84 Fed. (2d) 965; and *Wayne* v. *Owens-Illinois*, 91 Fed. (2d) 827).

In a corporation debtor proceeding under Section 77B the district court dismissed the petition on March 2, 1936. Appeal dismissed by the Appellate Court on April 15, 1936, because taken under the wrong Section of the Bankruptcy Act (section 25(b) of the Act of 1898). Long after time for appeal had expired, the debtor went back into the District Court and on April 24, 1936, filed a petition for rehearing and to vacate the original order of dismissal of March 2, 1936. This was fifty-three days after the entry of the original order of March 2, 1936. Time for appeal was thirty days. The District Court vacated the original order and granted a rehearing. The debtor then refiled its 77B

petition which the District Court dismissed. On June 11, 1936, the debtor appealed a second time under a different section of the Bankruptcy Act (Section 25(a) of the Act of 1898). This was one hundred and one days after the entry of the original order of March 2, 1936, or seventy-one days beyond the time for appeal.

The Appellate Court dismissed this second appeal saying:

> "We are of opinion that the court below was without power to grant a rehearing and set aside the order of March 2, 1936, after the expiration of the period allowed for appeal from that order. The order appealed from as well as the order setting aside the order of March 2 was therefore void; and as the effect of these orders was merely to extend the time for appealing from the order of March 2, we shall dismiss the appeal as though it had been taken from that order. Authority for this procedure is found in the cases cited. Appeal dismissed."

The "cases cited" were:

United States v. *East*, No. 55 page 41 of this brief;
Bonner v. *Pottorf*, No. 7 page 6 of this brief;
Matter of Stearns and White, No. 50 page 38 of this brief;

all being lower court opinions.

This court granted certiorari. The respondents moved to dismiss on the ground that the property had gone beyond the jurisdiction of the federal courts because a decree of foreclosure had become final before the jurisdiction of the federal court under Section 77B had been originally invoked and that subsequent to the original order of dismissal on March 2, 1936, and after the dismissal of the first appeal in the Appellate Court, a sale of the property had been confirmed, deed delivered and purchase money paid. The motion to dismiss was overruled.

The respondents further contended that the dismissal of the first appeal by the Appellate Court terminated the cause and since the thirty days for appeal had long since expired, the District Court was without power to entertain a petition for rehearing and therefore its second order of dismissal was void. Therefore, said the respondents, the second appeal was out of time and the Appellate Court properly dismissed it.

This court held:

1. A court of bankruptcy is a court of equity, but sits continuously and has no terms.

Citing:

Sandusky v. *First*, No. 47 page 36 of this brief, decided by this court, and other lower court decisions.

2. A court of equity may grant a rehearing and vacate, alter or amend a decree after appeal, and after time for appeal if within term.

Citing:

Aspen v. *Billings*, No. 4 page 3 of this brief;
Voorhees v. *Noye*, No. 60 page 45 of this brief;
Zimmern v. *United States*, No. 67 page 53 of this brief.

3. The fact that a bankruptcy court has no terms and sits continuously renders ineffective as to it the rule that a court of equity may not vacate a decree after term.

4. A bankruptcy court has power to revise its judgments on seasonable application before rights have vested. Courts of law and equity have such power limited only by the term and not by the expiration of the time for appeal or by the fact that an appeal has been taken. There

is no reason for denying a similar right of a bankruptcy court to the time for appeal.

Citing:

United States v. *Mayer*, No. 57 page 43 of this brief;
United States v. *Benz*, No. 54 page 41 of this brief;
Aspen v. *Billings*, No. 4 page 3 of this brief;
Voorhees v. *Noye*, No. 60 page 45 of this brief;
Zimmern v. *United States*, No. 67 page 53 of this brief.

5. The granting of a rehearing is discretionary and refusal to entertain it or the refusal of the rehearing if entertained are not subject to appeal.

Citing:

Brockett v. *Brockett*, No. 10 page 9 of this brief;
Steines v. *Franklin*, No. 51 page 38 of this brief;
Hardin v. *Boyd*, No. 24 page 20 of this brief;
Boesch v. *Graff*, No. 6 page 5 of this brief;
San Pedro v. *United States*, No. 46 page 36 of this brief.

6. If the court refuse to entertain the application for rehearing and the time for appeal expires, the right of appeal is lost.

Citing:

Roemer v. *Bernheim* (*Romer* v. *Neuman*) No. 43 page 34 of this brief.
Morse v. *United States*, No. 35 page 29 of this brief.
Clarke v. *Hot Springs*, No. 14A page 12 of this brief.

7. Where a rehearing is granted, only for the purpose of extending the time for appeal, the time is not extended.

Citing:

Re Stearns, No. 50 page 38 of this brief;
United States v. *East*, No. 55 page 41 of this brief;
Bonner v. *Potterf*, No. 7 page 6 of this brief.

8. A bankruptcy court may grant a rehearing and rehear upon the merits and even though it reaffirm its action and refuse to change its original order the time for appeal runs from its entry.

Citing:

Aspen v. *Billings*, No. 4 page 3 of this brief;
Voorhees v. *Noye*, No. 60 page 45 of this brief;
Citizens v. *Opperman*, No. 14 page 12 of this brief;
Morse v. *United States*, No. 35 page 29 of this brief.

This court said in the opinion:

Page 132:

"The Circuit Court of Appeals has decided that a District Court is without power to set aside its order dismissing a petition for reorganization under Section 77B of the Bankruptcy Act, 11 U.S.C. Section 207, and to rehear the cause after the expiration of the period allowed by the Act for appeal from the order; to resolve a conflict of decision we granted certiorari."

Citing as conflicting:

West v. *McLaughlin*, No. 64 page 52 of this brief;
Cameron v. *National*, No. 11 page 10 of this brief.

Saying: "This court has adverted to the question without deciding it. *Conboy* v. *First*". No. 16 page 13 of this brief.

Page 137:

"But we think the court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action. Courts of law and equity have such power, limited by the expiration of the term at which the judgment or decree was entered and not by the period allowed for appeal or by the fact that an appeal has been perfected."

"On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry."

Page 138:

"There was no abuse of sound discretion in granting the motion and reconsidering the cause."

No. 63. *Webster* v. *Barnes*, CCA 10 (1940), 113 Fed. (2d) 1003.

From the opinion:

"A proceeding in bankruptcy from the time of its commencement by the filing of the petition until the final settlement of the estate of the bankrupt is but one suit. A District Court, for the purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. The rule that a court may not vacate at a subsequent term an order made at a prior term has no application to a proceeding in bankruptcy. Proceedings in a bankruptcy suit at any time prior to its termination are open for re-examination upon application

therefor in appropriate form; and any order made in the progress of the proceeding may be set aside and vacated upon proper showing made."

The opinion cites:

Sandusky v. *National Bank*, No. 47, at page 36 of this brief.

No. 64. *West* v. *McLaughlin*, (1908) CCA 6, 162 Fed. 124. A referee's order in bankruptcy was affirmed. There were ten days for appeal. Forty-nine days thereafter a petition for rehearing was filed. In a second opinion "more at length", the order was again affirmed. Motion to dismiss appeal because taken too late. The appeal was allowed.

No. 65. *Windsor* v. *McVeigh*, 93 U. S. 574.

The court said:

"That the decree a court of equity upon oral allegations without written pleadings would be an idle act, of no force beyond that of an advisory proceeding of the chancellor. And the reason is that the courts are not authorized to exert their power in that way."

No. 66. *Wright* v. *Union Central*, (1940), 311 U. S. 273. At page 275 this court said:

"For example, it does not appear whether debtor asked for an appraisal under Section 75(s) which it is the duty of the court to make on such request and in which event **the three year stay provided for in Section 75(s) (2) may start to run only after such appraisal has been made.**"

The opinion cited:

John Hancock v. *Bartels*, No. 29, at page 23 of this brief;

Borchard v. *California*, No. 8, page 6 of this brief.

No. 67. *Zimmern* v. *United States*, 1936, 298 U. S. 167. At the suit of the United States judgment was rendered to set aside deed and a decree issued to sell real estate subject to wife's homestead. During term the judge of the District Court entered an order extending the term for 90 days. "It appearing to the court . . . and for good reason shown, it will be necessary to modify or amend said decree." The judge then, within ninety days, amended the decision to reserve also the wife's inchoate right of dower. The Appellate Court dismissed appeals on the ground that the extended term did not toll the running of time for appeal.

On certiorari this court said:

Page 169:

> "The judge had plenary power while the term was in existence to modify his judgment for error of fact or law or even to revoke it altogether. Finality of judgment was lacking until his choice was announced."

Respectfully submitted,

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Lima, Ohio
February 12, 1942.